A

Public Prosecutor v Muhammad Azrul bin Zainal

B HIGH COURT (GEORGETOWN) — CRIMINAL REVISION NO PA-43–4–03 OF 2019
MOHD RADZI JC
24 JUNE 2019

C *Criminal Procedure — Charge — Defective charge — Whether facts of case tendered by prosecution failed to support charge against accused — Accused charged with riding motorcycle in reckless and dangerous manner — Whether report of traffic policeman who arrested accused and prosecution's facts of case merely said accused had his body bent while riding his motorcycle — Whether report of*
D *traffic policeman who arrested accused and prosecution's facts of case merely said accused had his body bent while riding his motorcycle — Whether all evidence constituting facts of case did not support allegation in charge that accused 'challenging the speed' — Whether charge defective and incurable under ss 156 and 422 of the Criminal Procedure Code ('the CPC') — Whether magistrate*
E *should have rejected accused's guilty plea — Whether magistrate wrongly sentenced accused pursuant to s 293(1)(e) of CPC because that provision only applied to 'youthful offender' which accused was not at the time of his conviction*

The respondent ('Azrul') was charged in the magistrate's court with
F committing an offence under s 42(1) of the Road Transport Act 1987 ('the RTA'). Section 42(1) provided, inter alia, that any person who was convicted of driving a motor vehicle on a road recklessly or at a speed or in a manner that was dangerous to the public would be punished with a jail term not exceeding five years or be fined a sum between RM5,000 and RM15,000. The charge against
G Azrul read that he was riding a motorcycle on a public road in a manner that was dangerous to the public 'dengan membongkokkan badan dan menduga kelajuan' (by bending his body and challenging speed). Azrul pleaded guilty to the charge. His lawyer was present in court at the time. The magistrate was satisfied that Azrul understood the charge and the nature and consequences of
H his plea. The prosecuting officer then tendered the facts of the case ('P1') which Azrul admitted. According to the report of a traffic police officer ('P2') that was tendered in evidence, Azrul and four other motorcyclists were arrested by traffic police when they stopped for a rest after riding their machines in a dangerous manner along the Butterworth Outer Ring Road ('BORR'). After
I hearing Azrul's plea of mitigation, the magistrate, instead of applying the sentence prescribed in s 42(1) of the RTA, ordered Azrul to serve 120 aggregate hours of community service for a period of two years pursuant to s 293(1)(e) of the Criminal Procedure Code ('the CPC'). Section 293(1)(e) only applied to persons who were 'youthful offenders' at the time of conviction. Section 2 of

the CPC defined 'youthful offender' as one who was of the age of 18 years or above but below the age of 21. On the date of his conviction, Azrul was 23 years old. The magistrate wrote to the High Court to revise the sentence pursuant to s 31 of the Court of Judicature Act 1964 and s 325 of the CPC.

Held, setting aside Azrul's conviction and sentence and revoking the order made by the magistrate under s 293(1)(e) of the CPC:

(1) The sentence passed by the magistrate was wrong in law. Section 293(1)(e) of the CPC did not apply to Azrul as he was beyond the age of 21 years on the date of his conviction and therefore was not a youthful offender. The correct provision that should have been applied was s 42(1) of the RTA (see para 15).

(2) The charge against Azrul was badly framed as it was not consistent with the facts. The charge was defective and not curable under ss 156 and 422 of the CPC. Notwithstanding that Azrul had pleaded guilty, the prosecution, defence counsel and the magistrate had partaken in a comedy of not just errors but cursory conduct. The prosecution was careless in not ensuring that the charge was consistent with the facts; the defence counsel failed to discharge his duty of ensuring that his client did not plead guilty to an offence that was based on unclear facts while the magistrate failed to discharge her duty of ensuring when recording Azrul's admission of the facts of the case that the admitted facts constituted the offence in the charge, and if they did not, then Azrul should either have been discharged or a plea of not guilty entered and the matter be fixed for trial (see paras 34–35).

(3) In the instant case, the magistrate should not have accepted Azrul's guilty plea as it was based on a defective charge. He had admitted to facts of the case which did not support the charge. Therefore, his plea was not unequivocal and unconditional as there was no evidence to show that Azrul had understood that the facts did not actually support the charge (see para 36).

(4) Exhibit P2 did not describe how Azrul had ridden his motorcycle apart from saying that he was riding with his body bent (which logically meant it was bent forward to reduce wind resistance). P2 failed to state whether Azrul had exceeded BORR's speed limit or whether he was racing with other motorcyclists or whether the group he was with was riding in a manner that was dangerous to the public. P2 also failed to state in what way Azrul's bending of his body constituted a danger to others. Exhibit P1, which essentially repeated the contents of P2, similarly did not state how Azrul's bending of his body constituted a reckless and dangerous act. Again, there was no description of speed or whether he rode in a haphazard way or performed stunts or obstructed the movement of other vehicles (see paras 20 & 22–24).

(5) Unlike exhs P1 and P2, the charge against Azrul made reference to speed; that he had 'menduga laju' (literally, 'challenged the speed'). The charge was not framed on consistent and clear facts since P1 and P2 did not say Azrul had exceeded any speed limit or describe how the act of bending the body constituted danger to the public. The prosecution should have ensured that the charge reflected the facts. It could not introduce an element of the offence when the facts were absent otherwise it would amount to an attempt to concoct an element of the offence just so that a person could be charged under s 42(1) of the RTA. The facts had to show that Azrul's actions had created an obvious and serious risk of injury to person or damage to property and that he had given no thought to the possibility of that risk or had seen the risk but nevertheless decided to run it (see paras 26–28).

[Bahasa Malaysia summary

Responden ('Azrul') telah didakwa di mahkamah majistret kerana melakukan kesalahan di bawah s 4(1) Akta Pengangkutan Jalan Raya 1987 ('Akta'). Seksyen 42(1) memperuntukkan, antara lain, bahawa mana-mana orang yang disabitkan dengan memandu kenderaan atas jalan raya secara melulu atau dengan kelajuan atau dengan cara yang membahayakan orang ramai akan dihukum dengan hukuman penjara tidak melebihi lima tahun atau didenda dengan jumlah antara RM5,000 hingga RM15,000. Tuduhan terhadap Azrul dibaca bahawa dia telah menunggang motosikal di jalan raya dengan cara yang membahayakan orang ramai 'dengan membongkokkan badan dan menduga kelajuan'. Majistret berpuas hati bahawa Azrul memahami pertuduhan dan sifat serta akibat pengakuannya. Pegawai pendakwa kemudian telah menenderkan fakta kes ('P1') yang telah diakui oleh Azrul. Menurut laporan pegawai polis trafik ('P2') yang telah dikemukakan sebagai keterangan, Azrul dan empat penunggang motosikal yang lain ditangkap oleh polis trafik ketika mereka berhenti untuk berehat setelah menunggang motorsikal mereka dengan cara berbahaya di sepanjang Jalan Lingkaran Luar Butterworth ('BORR'). Setelah mendengar pengakuan mitigasi Azrul, majistret, tidak menjatuhkan hukuman yang ditetapkan dalam s 42(1) Akta, sebaliknya memerintahkan Azrul menjalani 120 jam agregat khidmat masyarakat selama dua tahun menurut s 293(1)(e) Kanun Tatacara Jenayah ('KTJ'). Seksyen 293(1)(e) hanya berlaku untuk orang yang merupakan 'pesalah muda' pada masa disabitkan kesalahan. Seksyen 2 KTJ mentafsirkan 'pesalah muda' sebagai seorang yang berumur 18 tahun ke atas tetapi di bawah usia 21 tahun. Pada tarikh sabitannya, Azrul berumur 23 tahun. Majistret telah menulis kepada Mahkamah Tinggi untuk menyemak semula hukuman tersebut berdasarkan s 31 Akta Mahkamah Kehakiman 1964 dan s 325 KTJ.

Diputuskan, mengetepikan sabitan dan hukuman Azrul dan membatalkan perintah yang dibuat oleh majistret di bawah s 293(1)(e) KTJ:

(1) Hukuman yang dijatuhkan oleh majistret adalah salah dari segi undang-undang. Seksyen 293(1)(e) KTJ tidak terpakai kepada Azrul kerana dia telah melebihi umur 21 tahun pada tarikh sabitan dan oleh itu bukan pesalah muda. Peruntukan betul yang patut terpakai adalah s 42(1) Akta (lihat perenggan 15).

(2) Pertuduhan terhadap Azrul tidak dibuat dengan betul kerana ia tidak konsisten dengan fakta. Pertuduhan itu cacat dan tidak boleh diperbetulkan di bawah ss 156 dan 422 KTJ. Walaupun Azrul telah mengaku bersalah, pihak pendakwaan, peguambela dan hakim telah mengambil bahagian dalam hal perkara ini yang bukan hanya kekhilafan tetapi dari segi tingkah lakunya. Pendakwaan telah cuai kerana tidak memastikan bahawa pertuduhan itu selaras dengan fakta; peguam bela gagal melaksanakan tugasnya untuk memastikan bahawa anak guamnya tidak mengaku melakukan kesalahan yang berdasarkan fakta tidak jelas sementara hakim gagal melaksanakan tugasnya untuk memastikan ketika merekodkan pengakuan Azrul mengenai fakta kes bahawa fakta yang diakui merupakan kesalahan dalam pertuduhan, dan jika tidak, Azrul sepatutnya dibebaskan atau pengakuan tidak bersalah dimasukkan dan perkara itu ditetapkan untuk perbicaraan (lihat perenggan 34–35).

(3) Dalam kes ini, majistret tidak patut menerima pengakuan beralah Azrul kerana ia berdasarkan pertuduhan yang cacat. Dia telah mengakui kepada fakta kes yang tidak menyokong pertuduhan itu. Oleh demikian, pengakuannya tidak tegas dan tidak bersyarat kerana tiada keterangan yang menunjukkan bahawa Azrul telah memahami bahawa fakta-fakta itu sebenarnya tidak menyokong pertuduhan tersebut (lihat perenggan 36).

(4) Ekshibit P2 tidak menggambarkan bagaimana Azrul menunggang motosikalnya selain mengatakan bahawa dia menunggang dengan badannya dibengkokkan (yang secara logiknya bermaksud membongkok ke depan untuk mengurangkan daya tahan angin). P2 gagal menyatakan sama ada Azrul telah melepasi had laju BORR atau adakah dia berlumba dengan penunggang motosikal lain atau sama ada kumpulan yang dia bawa menunggang dengan cara yang berbahaya bagi orang ramai. P2 juga gagal menyatakan dengan cara membongkokkan badannya Azrul membahayakan orang lain. Ekshibit P1, yang pada dasarnya mengulangi isi kandungan P2, juga tidak menyatakan bagaimana lenturan badan Azrul merupakan tindakan melulu dan berbahaya. Sekali lagi, tidak ada keterangan mengenai kelajuan atau apakah dia menunggang dengan cara yang tidak sengaja atau melakukan aksi atau menghalang pergerakan kenderaan lain (lihat perenggan 20 & 22–24).

(5) Tidak seperti ekshs P1 dan P2, pertuduhan terhadap Azrul membuat rujukan kepada kelajuan; bahawa dia 'menduga laju' (secara literalnya). Pertuduhan itu tidak dibuat berdasarkan fakta yang konsisten dan jelas

kerana P1 dan P tidak mengatakan Azrul telah melebihi apa-apa had laju atau menggambarkan bagaimana perbuatan membongkokkan badan merupakan suatu yang membahayakan orang awam. Pendakwaan patut memastikan bahawa pertuduhan menggambarkan fakta. Ia tidak boleh memperkenalkan elemen kesalahan tanpa kewujudan fakta jika tidak ia merupakan suatu percubaan untuk mereka-reka unsur kesalahan itu semata-mata supaya seseorang itu boleh didakwa di bawah s 42(1) Akta. Fakta-fakta hendaklah menunjukkan bahawa tindakan Azrul menimbulkan risiko kecederaan kepada orang atau kerosakan harta benda yang jelas dan serius dan bahawa dia tidak memikirkan kemungkinan risiko itu atau telah melihat risikonya tetapi tetap memutuskan untuk melakukannya (lihat perenggan 26–28).]

Cases referred to

Chin Ban Keat v Rex [1949] 1 MLJ 297 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69, SC (refd)
Mohammad bin Hassan v PP [1998] 5 MLJ 65, HC (refd)
Ng Song Luak v PP [1985] 1 MLJ 456 (refd)
PP v Margarita B Cruz [1988] 1 MLJ 539 (refd)
PP v Soon Tiew Choon [1976] 1 MLJ 189 (refd)
PP v Zulkifli bin Omar [1998] 6 MLJ 65, HC (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 31
Criminal Procedure Code ss 2, 156, 293(1)(e), 325, 422
Road Transport Act 1987 s 42(1)

Farah Aimy bt Zainul Anuar (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Mohd Khairul Fairuz bin Rahman (Shaiful Rahman, Hajar & Co) for the accused.

Mohd Radzi JC:

PREFACE

[1] By a letter dated 25 February 2019 the Magistrate's Court at Butterworth, Pulau Pinang wrote to this court seeking this court's revision with regards to sentence against the accused.

BACKGROUND

[2] The accused was charged with an offence under s 42(1) of the Road Transport Act 1987 ('the RTA') punishable under the same provision.

[3] Section 42(1) of the RTA read as follows:

42 Reckless and dangerous driving

(1) Any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding five years and to a fine of not less than five thousand ringgit and not more than fifteen thousand ringgit and, in the case of a second or subsequent conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than ten thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than two years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

(4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall revoke his driving licence.

THE CHARGE

[4] The charge ('charge') against the accused read as follows:

Pertuduhan:

Bahawa kamu pada 28/10/2018 jam lebih kurang 0130 pagi di Lebuhraya Lingkaran Luar Butterworth (BORR), dalam daerah Seberang Perai Utara dalam negeri Pulau Pinang, sebagai penunggang motosikal nombor pendaftaran: MCM 4377 telah menunggang kenderaan itu di jalan awam dengan cara merbahaya kepada orang lain dengan membongkokkan badan dan menduga kelajuan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 42 (1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah akta yang sama.

Hukuman:

Jika disabitkan kesalahan hendaklah dihukum penjara selama tempoh tidak melebihi lima tahun dan didenda tidak kurang daripada Lima Ribu Ringgit dan tidak lebih daripada Lima Belas Ribu Ringgit.

PROCCEDINGS BEFORE THE MAGISTRATE

[5] On 18 February 2019 the accused had pleaded guilty to the said charge in presence of his counsel. Based on the notes of proceedings the magistrate was satisfied that the accused understood the nature of the offence and the consequences of his plea and that he desired to unconditionally plead guilty to the charge.

[6] The facts of the case was tendered as exh P1. The accused admitted to the facts of the case and then after the magistrate recorded the plea of guilty by the accused.

[7] At sentencing, after hearing the accused's plea of mitigation and after hearing the prosecutor the learned magistrate sentenced the accused to 120 aggregate hours of community service for a period of two years pursuant to s 293(1)(e) of the Criminal Procedure Code ('the CPC').

SECTION 293(1)(e) OF THE CPC

[8] Section 293(1)(e) read as follows:

> 293 Youthful offenders
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> (1) When any youthful offender is convicted before any Criminal Court of any offence punishable by fine or imprisonment, the Court may, instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment.
>
> (a) order the offender to be discharged after due admonition if the Court shall think fit;
>
> (b) order the offender to be delivered to his parent or to his guardian or nearest adult relative or to such other person as the Court shall designate on such parent, guardian, relative or other person executing a bond with or without surety or sureties, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of the offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to that offender in the nature of the conditions referred to in paragraphs 294A(a), (b) and (c) which the Court shall think fit to give;
>
> (c) order the offender, if a male, to be whipped with not more than ten strokes of a light cane or rattan within the Court premises and in the presence, if he desires to be present, of the parent or guardian of that offender;

(d) deal with the offender in the manner provided by the Child Act 2001 [Act 611]; or

(e) (i) to make an order requiring the offender to perform community service, not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to such conditions as may be specified by the Court;

(ii) in this paragraph, community service means any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority; and

(iii) the community service under this paragraph shall be under the Minister charged with the responsibility for women, family and community.

[9] It is clear that for s 293(1)(e) to apply the accused must be a youth when he was convicted. Who is a 'youthful offender' for the purpose of the CPC?

[10] Section s 2 of the CPC defines 'youth offender' as follows:

'Youthful offender'

Means a person convicted of an offence punishable by fine or imprisonment who is of or above the age of eighteen and below the age of twenty-one.

[11] Therefore it is a matter of fact and law to be determined by the court that the accused was a youthful offender when he was convicted. There lies the error of the magistrate when she made the order under s 293(1)(e) against the accused. At that date his age had passed 21. He was in fact already 23 years old on the date of conviction. As such, by law, s 293(1)(e) of the CPC cannot be applied for the benefit of the accused.

[12] Hence, the reference of this case to this court for a revision on sentence.

POWER OF REVISION

[13] The power of revision by the High Court are found in s 31 of the Courts of Judicature Act 1964 and s 325 of the CPC:

Courts of Judicature Act

31 Revision of criminal proceedings of subordinate courts

The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

Criminal Procedure Code

325 Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an .opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

[14] Abdul Hamid CJ (as he then was) in the Supreme Court case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69, described the duty of the High Court in exercising its revisionary powers as follows:

> Duty of High Court
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> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
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> The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

THE REVISION

[15] With regards to the correctness of the sentence passed I find that indeed the magistrate had committed an error of the law. Based on the facts of the case the accused's NRIC number 961212075569 confirms that s 239(1)(e) of the CPC did not apply to the accused as he was not a youthful offender on the date conviction as he was already beyond 21 years of age. The correct provision to be applied with regards to punishment is s 42(1) of the Road Transport Act.

ANALYSIS OF FACTS

[16] In considering what would be a fair and just punishment to be meted out against the accused under s 42(1) I considered the facts of the case that became the basis of the charge against the accused.

[17] Deputy public prosecutor respectfully left the matter to be best considered and decided by this court and counsel for the accused briefly submitted that there are inconsistencies between the facts of the case and the charge.

[18] Firstly, I read the police report *trafik* S/Perai Utara/010473/18 (exh P2). A

[19] Exhibit P2 states essentially that a group of motorcyclists had driven their motorcycles in a manner where they bent their bodies and they rode their motorcycles one round from the Bagan Ajam Toll along the Butterworth Outer Ring Road ('BORR') towards Butterworth Toll and then back to the Bagan Ajam Toll. The accused's motor cycle was identified as one of the motorcycles in that group. The accused was arrested with four others at the Bagan Ajam Rest and Relax parking area after they had stopped and parked their motorcycles there. The relevant part of the police report states: B C

> Semasa buat pemerhatian kesemua penunggang tersebut melakukan aksi dengan membongkokkan badan ...

[20] Exhibit P2 did not describe how the accused rode his motorcycle apart from bending his body, which logic requires me to assume that it must be bent forward as usually seen of motorcyclists who ride their motorcycles at a high speed to reduce wind resistance. D

[21] This court notes that the maker of exh P2, one Lance Koperal Mohamad Khairi bin Hussain stated that he together with two other officers had followed the group of motorcyclists from a short distance that was close enough for them to identify the type and make of each of the motorcycles, the color of the clothes of each of the rider of the motorcycle in that group and the color and type of helmet of each the rider wore. Yet, in the police report Mohamad Khairi neglected to describe in greater detail how the motorcyclists rode along the BORR apart from the fact that they bent their bodies. If his distance to the motorcycle group was close enough for him to identify the motorcycles, the clothes and the helmets the riders used, surely he would have been able to state with sufficient certainty the estimated speed they were moving along BORR and the manner they were riding their motorcycles. E F G

[22] It is my finding of exh P2 that the police report did not state:

(a) if in fact the accused rode his motorcycle in excess of the speed limit of BORR; H

(b) if the accused was racing with the other motorcyclists;

(c) if the group of motorcyclists that the accused was part of had rode in a manner that was dangerous to the public; and I

(d) in what way the bending of the body constituted a danger.

[23] Moving on, I then read the *fakta kes* (exh P1) that was prepared by the investigation officer, Insp Abd Rahman bin Rahid. Exhibit P1 essentially

repeated the contents of P2. With regards to the accused, the fakta kes added:

> ... tertuduh telah memandu secara melulu dan membahayakan dengan membongkokkan badan bersama bebrapa m/sikal lain dan setelah didapati perbuatan menunggang m/sikal tersebut boleh mendatangkan bahaya kepada dirinya dan pengguna jalan yang lain.

[24] The plain reading of the fakta kes suggests that the accused had recklessly and dangerously rode his motorcycle *by bending* his body. However, exh P1 did not state how the mere bending of the body constituted 'melulu dan membahayakan' that is, reckless and dangerous. Again, there was no description of the speed of the motorcycle and the manner that the accused rode the motorcycle, was it in a haphazard way or were there stunts performed or did the accused's motorcycle obstructed the movement of other vehicles?

[25] I finally considered the charge. In framing the charge, the prosecutor described the elements of the offence as '... dengan cara merbahaya kepada orang lain dengan membongkokkan badan dan menduga kelajuan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 42(1) Akta Pengangkutan Jalan 1987 ...'.

[26] The charge makes reference to speed. It is the first time speed is mentioned since the police report and *fakta kes*.

[27] Thus when reading and comparing all three documents we can see the following:

(a) police report states only 'membongkokkan badan';

(b) *fakta kes* adds the word 'memandu secara melulu dan membahayakan dengan membongkokkan badan'; and

(c) the charge made reference to speed that is, 'dengan membongkokkan badan dan menduga laju' or in its literal English translation, 'challenging the speed'.

[28] Having read and compared exhs P1, P2 and the charge, I find that the charge was framed not based on consistent and clear facts. There were clearly no facts in P1 and P2 to show that the accused exceeded any speed limit and the facts did not describe how the act of bending the body constituted danger to the public. There must be consistent and clear facts to serve as the basis for the charge. It was incumbent on the deputy public prosecutor to ensure that the charge reflected the facts. The deputy public prosecutor cannot introduce an element of the offence when the facts are absent, otherwise it amounts to an attempt at concocting an element of the offence just so the accused can be charged under s 42(1) of the RTA.

[29] For the act 'membongkokkan badan' or bending the body to constitute danger to the public, the facts must show some other acts that when done together must have caused risk of danger to the public. The facts should show that after bending the body the accused suddenly accelerated his motorcycle or he had flattened his body on the motorcycle or he zig-zagged in and out of lanes or he then raced with the other motorcycles, all to the danger of the public or other users of the BORR. Whilst it is common knowledge that motorcyclists would bend forward when they accelerate their motorcycles to reduce wind resistance, we cannot in absence of any specific description in P1 or P2 assume that indeed that in fact happened.

[30] The same critique applies to 'menduga laju' or challenging the speed/speeding with acceleration. Neither P1 nor P2 stated with any certainty that the accused had sped in his motorcycle in excess of the BORR speed limit after bending his body or having sped at all. Speed in itself does not necessarily lead to danger. For the speed at which the accused rode to amount to being dangerous or reckless, the facts must show that the accused's act must have created an obvious and serious risk of injury to the person or damage to property and must have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it. Please see the decision of Vincent Ng J in *Public Prosecutor v Zulkifli bin Omar* [1998] 6 MLJ 65.

THE LAW

[31] In *Public Prosecutor v Soon Tiew Choon* [1976] 1 MLJ 189, Hashim Yeop Sani J (as he then was) said:

> It is elementary but nonetheless fundamental that when an accused pleads guilty to a charge the brief facts given by the prosecuting officer must reflect the true and essential elements in the charge.

[32] In *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65, an oft referred decision that had set out the various principles with relating to acceptance of plea of guilt, Augustine Paul JC (as he then was) said:

> When recording the facts, the magistrate will also have to record the accused's admission or denial of them. The accused's answer on the accuracy of the facts should be recorded (see *Lee Yu Fah & Ors v PP*). It is not essential, however, that the accused should admit every iota of facts given by the prosecution. If what he admits contains all the ingredients of the offence and what he disputes or does not admit is irrelevant or immaterial to the offence, such an admission is sufficient and the court should accept the plea (see *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77 (HC)). The record must show that the magistrate himself read and examined the facts of the case to see whether they were conformable with the law and in support of the charge as the record must speak for itself (see *Ng Song Luak v Public Prosecutor* [1985] 1 MLJ 456 (HC)). If the facts admitted to do not constitute the offence

A charged, the magistrate will then have to consider whether to discharge the accused or enter a plea of not guilty and proceed to trial (see *Chin Ban Keat v Rand Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 (FC)). In no event should the court acquit the accused if the facts do not disclose an offence (see *Public Prosecutor v Mahmud* [1974] 1 MLJ 85 (HC); *Public Prosecutor v Soon Siew Choon* [1976] 1 B MLJ 189 (HC)

[33] In *Ng Song Luak v Public Prosecutor* [1985] 1 MLJ 456, the High Court in hearing an appeal held:

C The record shows that upon the appellant pleading guilty to the charge, written facts of the case were submitted to the learned President, but there is no indication in the record that these facts were read and explained to the appellant. There is also no record indicating that the learned President has himself read and examined the facts of the case to see whether they were conformable with the law and in support of the charge. These might have been done as emphatically explained by the learned D President, Sessions Court. But the record must speak for itself.

FINDING

E **[34]** Based on the above principles and considering exhs P1 and P2, I find that the charge was badly framed. It was not consistent with facts. Notwithstanding that the accused had pleaded guilty to the charge in presence of his counsel, all the three court officers who are the deputy public prosecutor, the defense counsel and the magistrate partook in a comedy of not just errors F but cursory conduct. The deputy public prosecutor was careless in ensuring that the charge was consistent with facts, the defense counsel failed in discharging his duty in ensuring that his client did not plead guilty to an offence that was based on unclear facts and the magistrate failed in discharging her duties as laid out in *Chin Ban Keat v Rex* [1949] 1 MLJ 297:

G When recording the facts the magistrate will also have to record the accused's admission or denial of them and if the facts admitted do not constitute the offence charged the Magistrate will then have to consider whether to discharge the accused or enter a plea of not guilty and proceed to trial.

H **[35]** Having considered the facts of the case, exhibits and the charge, I find that the charge was defective and not curable under ss 156 and 422 of the Criminal Procedure Code.

I **[36]** The magistrate should not have accepted the plea of guilty as it was based on a defective charge. The accused admitted to facts of the case that did not support the charge. Therefore his plea was not unequivocal and unconditional as there is no evidence to show that he understood that the facts did not actually support the charge.

[37] As stated by KC Vohrah J in the case of *Public Prosecutor v Margarita B Cruz* [1988] 1 MLJ 539:

> ... when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

[38] I take this opportunity to further remind magistrates that they are at all times required to perform their duties with the utmost care for what is provided under the law with regards not only to the discharge of a fair and proper trial for but also to ensure that all pre-trial processes are within the law. A magistrate should not be just perfunctory in discharging his or her duty for the sake of speedy disposal of a case by merely relying on the expectation that the deputy public prosecutor would have done his job properly when framing a charge. The accused has the expectation that when he is charged of an offence, the administration of justice will ensure that he will be not be charged wantonly without clear facts that constitute the essential ingredients of an offence. To allow that to happen would be a miscarriage of justice.

[39] I would also hasten to add that counsels are expected to act in the interests of their clients with a degree of competence that would ensure that the client's rights under the law is sufficiently protected. In this case there does not seem to be any fact to suggest that the accused's counsel took time to study the facts of the case and to discover the anomalies as described above. The accused had a legitimate right and expectation that his counsel will act. with competence.

[40] In the case of *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471, where the issue of incompetence of counsel was deliberated, Gopal Sri Ram FCJ in delivering the judgment of the Federal Court said:

> The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v The State* [1994] UKPC 1, where he put the test as follows:
>
> > In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.
>
> ...
>
> In our considered judgment, the incompetence of counsel in the conduct of a

defence in a criminal trial is a ground on which a conviction may be quashed provided that: (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice.

...

As the Federal Court said in *Wong Lai Fatt v Public Prosecutor* [1973] 2 MLJ 31; 1 MLJ 471 at p 477:

> The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd and others* [1969] 2 QB 158 at p 166:
>
> > We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.

DECISION

[41] Based on the above findings and in the exercise of the powers of revision of this court the conviction and sentence against the accused is hereby set aside. The order under s 293(1)(e) is immediately revoked. Bond of RM2,300 shall be returned to the surety.

Order accordingly.

Reported by Ashok Kumar